EX PARTE OR LATE FILED

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

February 18, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW TW-A325
Washington, DC 20554

RE: Ex Parte Filing, Subscriber List Information, Section 222(e) of the Telecommunications Act of 1996, CC Docket No. 96-115

Dear Secretary Salas:

The Office of Advocacy, U.S. Small Business Administration, in accordance with Section 1.1206 of the Commission's rules, hereby respectfully submits two copies of the enclosed written ex parte presentation regarding the above-referenced proceeding.

Please note that Advocacy was unable to file electronically before the 4:00PM Sunshine deadline due to congestion on the Internet. Therefore, this letter has been filed manually with-in the hour of this deadline. To the extent that a waiver is necessary for this late filing, we respectfully request the Commission's approval.

Thank you for your assistance on this matter. Please call with any questions.

Very truly yours,

S. Jerell Trigg,
Assistant Chief Counsel for
Telecommunications

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cc: The Honorable William E. Kennard
The Honorable Susan Ness
The Honorable Michael Powell
The Honorable Harold Furchtgott-Roth
The Honorable Gloria Tristani

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The Honorable William E. Kennard
Chairman
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445 12th Street, S.W.
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RE: Ex Parte Filing, Subscriber List Information, Section 222(e) of the Telecommunications Act of 1996, CC Docket No. 96-115

Dear Chairman Kennard:

The Office of Advocacy, U.S. Small Business Administration ("Advocacy") understands that the Subscriber List Information ("SLI") proceeding implementing Section 222(e) of the Telecommunications Act of 1996 ("1996 Act"), is scheduled to be on the Agenda for the February Public Meeting. We commend this action. To assist in the Commission's efforts to bring this proceeding to some closure, this letter addresses two lingering issues that we hope the Commission will resolve in the Report and Order in a way that will eliminate substantial market entry barriers for two classes of small entities that are impacted by this proceeding.

The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4).[1]

As noted above, two classes of small entities, Independent Directory Publishers ("IDP") and Competitive Local Exchange Carriers ("CLEC") face serious market entry barriers directly due to certain unreasonable business practices of some Incumbent Local Exchange Carriers ("ILEC"). Advocacy is concerned that without explicit direction from the Commission such business practices will become commonplace or even more egregious.

[1] Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

I. Access to CLEC SLI

It has come to Advocacy's attention that an increasing number of ILECs now refuse to provide CLEC SLI to IDPs. The IDPs must then go directly to the CLEC to receive SLI for the CLECs' new customers. In effect, the CLEC has provided SLI twice and at its own expense, once to the ILEC and again to the IDP. It is our understanding that some CLECs do not have the capability to provide the listings at all or to provide them in a useful format. Those CLECs that serve as resellers for ILECs may not be able to provide SLI because the ILEC essentially manages the database.

This is an incredibly inefficient use of resources for both the CLEC and the IDP. Furthermore, it is not necessary, nor is it equitable to add this additional burden on CLECs already facing additional market barriers inherent to offering competition in the local loop when ILECs have immediate access to new listings and already have systems in place to provide SLI on an accurate and timely basis.

Significantly, as evidenced by interconnection agreements between ILECs and CLECs, it appears to be a standard practice for ILECs, in the capacity as providers of telecommunications service, to require that CLECs provide SLI to the ILEC for free. See, e.g. BellSouth/WinStar Master Interconnection Agreement, § 6.13(b) ("The Companies shall provide BellSouth with its directory listings and daily updates to those listings (including new, changed and deleted listings) in a mutually acceptable format.") (emphasis added) Advocacy believes that it is unconscionable, not just unreasonable, for an ILEC to withhold CLEC SLI it received at no additional cost from a competing IDP. It is also of concern that some ILECs charge supra-competitive rates for new and updated listings or require them to be purchased with initial listings already received and paid for.

Advocacy concurs with the Association for Local Telecommunications Services ("ALTS") and Association of Directory Publisher's ("ADP") comments that the Commission has ample authority to establish such a policy to require ILECs to provide CLEC SLI to independent publishers and at reasonable and nondiscriminatory rates, terms, and conditions. Joint Ex parte Letter from Heather Burnett Gold, President, ALTS, and R. Lawrence Angove, President, ADP to Magalie Roman Salas, Secretary, Federal Communications Commission (July 16, 1998).

However, the Commission may question whether such a policy is consistent with the recent Supreme Court decision regarding unbundled network elements in AT&T Corp. v. Iowa Utilities Board, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141, 1999 US LEXIS 903 (Jan. 25, 1999). Although the Court held that the Commission has "general rulemaking authority" to implement the 1996 Act (of which Sec. 222(e) is an important part to spur increased competition in the publishing industry), it remanded Rule 319 to the FCC because the Court determined that the FCC had failed to apply some limiting standard, "rationally related to the goals of the Act," to determine whether a competitor's access to an incumbent's network elements is necessary before the FCC imposed such requirements. Id. at *31-5. The Court

determined that because some network elements may be available from other sources than an ILEC, a blanket access requirement is unreasonable. Id. In the SLI context, while not directly applicable, it could be argued that SLI is also available from a source other than ILECs therefore, making it unreasonable to require ILECs to provide access to CLEC SLI.

Advocacy believes that the Iowa Utilities Board decision is easily distinguishable from the instant proceeding and therefore, does not prohibit the FCC from imposing such a requirement on those ILECs that collect CLEC SLI. First, there are no similar Sec. 251(d)(2) "necessary and impair" standards that have been set forth explicitly in Sec. 222(e) that would limit the FCC's rulemaking. The Commission's final rules for Sec. 222(e) must simply serve the public interest. Even if there were such "necessary and impair" standards, Advocacy believes that the FCC could meet such a standard based on the administrative record.

Second, a policy to require ILECs to provide CLEC SLI is not only rationally related to the goals of the Act, it is required by the plain language of Sec. 222(e). The statute requires the telephone exchange service provider to provide SLI "under nondiscriminatory and reasonable rates, terms, and conditions." 47 U.S.C. § 222(e). This can reasonably be interpreted to mean that an ILEC that obtains CLEC SLI for its own use or its subsidiary's use, and subsequently withholds it from an independent publisher is discriminating unreasonably and in violation of Sec. 222(e).

There are also different types of SLI: 1) initial; and 2) updated listings that include new customer information from CLECs. The statute also requires that SLI be provided on an "unbundled basis." 47 U.S.C. § 222(e). Advocacy asserts that this requirement includes unbundling not just from other ILEC elements and services but also from the different types of SLI. Therefore, an ILEC's new and updated listings, from any source, are also separate elements from the initial listings and must be provided to IDPs. The bottom-line is if the ILEC receives new and updated listings from another source in its capacity of a telecommunications provider, it must also make those same listings accessible and unbundled.

Finally, unlike the FCC's UNE rules, such a policy would not operate as a blanket requirement. The requirement would only apply to those ILECs that collect CLEC SLI.

II. Cost-Based v. Market-Based Pricing

The second major issue before the Commission is whether to impose pricing standards and if so, whether they should be "cost-based" (as requested by the independent publishers) or "market-based" (as requested by the ILECs). Advocacy supports the "cost-based" model with specific protections for small ILECs whose costs may exceed the benchmark. Ex parte Letter to Magalie Roman Salas from Jere W. Glover and S. Jenell Trigg, Office of Advocacy, U.S. Small Business Administration, September 17, 1998. Our proposal also includes a waiver process to adjust the benchmark for any carrier whose costs are indeed higher. Id.

Throughout this proceeding, Advocacy has spoken to many interested commenters, small and large, as a means to better understand the directory publishing business and to balance the interests between conflicting small entities. Advocacy appreciates the opportunity to have discussed this issue at length with large ILECs such as BellSouth. BellSouth argues that LECs "do not have any form of 'bottleneck' control over [SLI]." Letter from Stephen L. Earnest, BellSouth, to S. Jenell Trigg, Office of Advocacy, U.S. Small Business Administration 1 (October 6, 1998); see also Ex parte United States Telephone Association, January 14, 1999. They also argue that the 1996 Act "does not support or authorize a mandated price for such services based on cost." Id.

We respectfully disagree with USTA and BellSouth on both arguments. In addition to the administrative record, which is replete with evidence of bottleneck control, in its deliberations on Section 222(e), Congress recognized that "LECs have total control over subscriber list information." H.R. Rep. No. 104-204, at 89 (1995)(emphasis added).

Furthermore, Advocacy believes that BellSouth's reliance on the absence of explicit language regarding costs in the 1996 Act and its legislative history in support of its position on "market-based" pricing is ill placed. Granted, the House Report also states that "[t]his section meets the needs of independent publishers for access to subscriber data on reasonable terms and conditions, while at the same time ensuring that the telephone companies that gather and maintain such data are fairly compensated for the value of the listings." House Report, at 89.

However, the phrase "value of the listings" can be interpreted two different ways. One, to mean prices are based on whatever the market will bear (i.e. "market-based cost"), or two, meaning that the LEC should not be forced to give away its listings or price it at incremental costs, but that it be compensated fairly. However, only the second interpretation is reasonable because it is consistent with the rest of the paragraph – the very same paragraph that begins with "LECs have total control over subscriber list information."

Advocacy cannot reconcile this paragraph in its entirety with BellSouth's interpretation that Congress meant "market-based costs." Under standard economic theory, a single source database, (i.e. monopolist as designated by Congress and the U.S. Copyright Office, Report on Legal Protection for Databases, at 129 (Aug. 1997)), will set high prices over costs because there are no competitors. U. S. Anchor Mfg. v. Rule Industries, Inc. 7 F.3d 986, 994 (11th Cir. 1993) (cert. Denied, recorded at 1994 U.S. Lexis 4715) (quoting American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1581 (11th Cir. 1985) ("monopoly power is the 'power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market by either restricting entry of new competitors or by driving existing competitors out of the market.'"). Conversely, in a competitive market, costs and rates converge. See generally, MCI v. FCC, 143 F.3d 606 (D.C. Cir. 1998).

Therefore, Congress could not have implicitly nor explicitly required costs based on what the market will bear when they clearly stated that LECs "have total control," i.e. monopoly power over SLI. Because there is no real competition among SLI suppliers and essentially just one provider, "market-based" and "monopoly-based " pricing are interchangeable terms, hardly the state of competition envisioned by the 1996 Act. Therefore, it is only logical that the legislative history's reference to "value" is to be read to mean that ILECs should receive fair compensation for their listings reasonably interpreted as cost-based prices with a reasonable profit. Significantly, if SLI was truly a competitive market as argued by USTA and BellSouth, there would be no need for the FCC to impose "cost-based" prices because the market would already be there. In fact, there wouldn't have been the need for Congress to include Sec. 222(e) in the 1996 Act in the first place if the industry was functionally properly.

The Commission's adoption of final rules that level the playing field for IDPs and outline explicitly the responsibilities of ILECs and CLECs, including updates and new listings, would go far to serve the FCC's mandate under Section 257 of the 1996 Act to identify and eliminate market entry barriers for small businesses. 47 U.S.C. § 257.

Thank you for your consideration. Please contact S. Jenell Trigg, Assistant Chief Counsel for Telecommunications if you have any questions or comments. Ms. Trigg can be reached at 202-205-6950.

Very truly yours,

Jere W. Glover
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